ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the matter of	)	
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Amend of Parts 1, 2 and 21 of the Commission's Rules Governing Use of Frequencies in the 2.1 GHz and 2.5 GHz Bands	)	PR Docket No. 92-80

COMMENTS OF THE S. ROBERTS COMPANY

Submitted by:

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SUMMARY

TSRC applauds the sentiments underlying the NPRM, as well as the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; 4) to punish those who submit false preference requests; and 5) to reduce the existing backlog by conducting lotteries and moving forward on a first-in-first-out basis.

TSRC believes the public interest is best served by the rapid processing of the backlog of pending MDS applications once the consolidated data base is established, and by the maximization of equity capital available for construction and operation of licensed systems. TSRC therefore strenuously opposes the proposal to prohibit settlement agreements among already-pending MDS applicants, because the retroactive imposition of such a prohibition upon already-pending applications will slow down processing of those applications and reduce the pool of available equity capital without advancing one iota the Commission's stated goal of deterring speculative applications.

Contrary to the presumption implicit in the retroactive prohibition proposal, no pending MDS application is going to be voluntarily withdrawn if settlements are prohibited, even if the Commission offers to return the $155 filing fee. That filing fee is a small part of the overall cost of getting an MDS application prepared and filed, and MDS applicants generally join settlements to hedge against pre-licensing (i.e., inherent lottery) risks, not

post-licensing (i.e., general business) risks. Retroactively prohibiting settlements for already-filed applications merely increases the number of applicants per lottery, precludes the possibility of full-market settlements to eliminate some lotteries, and reduces the ultimate number of partners in the eventual licensee who are available to make capital contributions.

The Commission should also expressly allow post-filing, pre-acceptance settlements of pending applications.

TSRC opposes the proposal to eliminate the present carrier/-interference ratio standard and to replace it with either a strict mileage separation standard or a mileage separation height/power table. The disruption this proposal will cause to wireless cable by eliminating the potential for additional channel capacity far outweighs any limited administrative convenience it creates for FCC staff in processing. Once the Commission completes the consolidated ITFS/MDS data base, the Commission will be able to formulate a simple and workable computer program enabling its processing staff to apply the current C/I ratio standard accurately and expeditiously.

TSRC believes that if the Commission goes forward with its proposed revamping of MDS rules with the modifications suggested in these Comments, the Commission will have advanced in a material way the viability and competitiveness of wireless cable as a vehicle for delivery of video programming to the home.

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The S. Roberts Company ("TSRC"), by its attorneys and pursuant to Section 1.419 of the Commission's rules, hereby submits comments in the above-captioned proceeding, in response to the Notice of Proposed Rulemaking, FCC 92-173, released May 8, 1992 ("NPRM").

TSRC supports the Commission's goals enunciated in the NPRM of promoting and encouraging the development of a viable and competitive wireless cable industry and the development of Instructional Television Fixed Services by educational institutions. Many of the proposals set forth in the NPRM, as presented or with some modifications, will further these goals and should be implemented. Other proposals set forth in the NRPM will only serve to undercut the Commission's goals and would prevent wireless cable from becoming a competitive, much less viable, industry. These issues are addressed herein together with some suggested modifications and alternatives which could assist in developing a more beneficial, comprehensive framework of rules and policies regulating wireless cable.

I. Introduction.

TSRC and affiliates of TSRC have interests in conditional licensees, tentative selectees and pending applications for Multipoint Distribution Service ("MDS").[1] In an effort to accumulate sufficient channel capacity to develop commercially viable wireless cable systems in various communities, TSRC has applied for available E and F Group channels, MDS 1, MDS 2A and H Group channels, and ITFS channels, and has committed much time and resources, including significant capital, to prosecuting its applications and developing strong wireless cable enterprises. TSRC has a very strong interest in any new rules or rule modifications promulgated by the Commission which will affect the wireless cable industry and on TSRC's ability of to construct and successfully operate wireless cable enterprises in the public interest.

II. Background.

The NPRM proposes far-reaching changes to the rules, policies and guidelines that govern the processing of Multipoint Distribution Service ("MDS") applications, the licensing of MDS stations and the subsequent operation of such facilities. The proposals in the NPRM are of critical importance to the future operations of TSRC.

During the last several years the wireless cable industry, which utilizes MDS stations and excess air time of Instructional

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[1] The term MDS is used herein to refer collectively to the single channel (MDS) and multi-channel (MMDS), multipoint distribution service facilities.

Television Fixed Service ("ITFS") stations to deliver video programming to the home, has undergone an enormous change. The wireless cable industry has successfully combined channels allocated to MDS/ITFS services to form wireless cable systems providing high quality, line-of-sight television service of up to 33 channels.[2]

Typically, wireless cable operations offer subscribers a mix of local and distant broadcast stations and satellite-delivered programming services identical to those offered by conventional cable television. Although the technology for wireless cable systems has been available for many years, a variety of factors have recently converged making the industry much more attractive to investors and operators alike. Factors contributing to the current expansion of wireless cable operations include: Congressional calls for competition to cable; the increasing availability of programming for wireless cable systems; and, perhaps most importantly, flexibility of the Commission's rules and policies to encourage the development of wireless cable systems as a viable competitor to cable service.

Wireless cable can serve areas where traditional cable is not operating or is not likely to be established. More and more, wireless cable systems are reaching disenfranchised Americans who will never be served with conventional cable television signals. In addition, because wireless cable operates over the air and

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[2] Additional channels can be added through the use of enhanced reception of local off-air signals.

requires no capital for laying cable, wireless operators typically set subscriber programming package prices at or below those charged by traditional cable operators, and thereby offers consumers an alternative to and a check upon the virtual monopoly wired cable has had in many markets.

Technologically, the quality and reliability of wireless cable surpasses that of traditional cable, since the picture quality from microwave is typically better than that provided via coaxial cable. Additionally, wireless cable signals are not affected by the signal degradation or power outages that occur with traditional cable service. With all of these advantages that wireless cable has vis a vis conventional coaxial cable service, it is a service which fulfills a tremendous public demand and serves an important public interest. One of the main reasons for increased consumer interest in wireless cable is that flexibility in Commission rules has permitted wireless cable systems to offer the kind of cable look-a-like service that consumers want.

Proposals in the NPRM would substantially affect the ability of wireless cable companies to compete with cable and thus are of enormous concern to TSRC. These comments are offered to provide the Commission with the input of an industry member who hopes to be able to bring the educational and entertainment benefits of subscription television to disenfranchised members of the public and to offer an alternative to those members of the public who do not want to be a part of the cable monopoly.

III. The FCC Should Not Retroactively Prohibit Settlements Among Mutually Exclusive MMDS Applicants

In the NPRM, at ¶17, the Commission proposes to prohibit settlement agreements among MMDS applicants and to apply this prohibition not only to MMDS applications filed after the effective date of the Commission's Rules, but also to all pending applications already on file. The purported justification for this prohibition on settlements is "to deter the filing of speculative applications by restricting lottery entry to entities with a sincere interest in using MMDS frequencies for their intended purposes.[Footnote omitted.]" However, the stated goal can be met by prospectively prohibiting settlement agreements with regard to as-yet-unfiled applications. Retroactive application of the new rule to pending applications would not deter speculative filings since, by definition, an already pending application already has been filed.

An applicant that has already expended funds to design an MMDS system and file an application therefor is not going to withdraw that application voluntarily, pre-lottery, merely because settlements groups are not available. TSRC does not agree with the premise underlying the Commission's proposal to prohibit settlement agreements -- that premise being that any applicant willing to enter into a settlement agreement must be an insincere applicant and a speculator -- but even assuming that the Commission's premise is correct, even an "insincere speculator", in reaction to a settlement prohibition, will maintain his or her application on file. And even if such a "speculator" were unwilling to construct

and operate, such an applicant would have absolutely no incentive to voluntarily withdraw a pending application which on its face is eligible for participation in a lottery. Rather, such a hypothetical "speculator" would take his or her chances in the lottery and if successful would obtain a conditional license and then seek nonrecourse debt financing for the system. Only in the event that such financing ultimately was unavailable would such a hypothetical "speculator" fail to construct in a timely manner, and even then he or she would merely let the conditional license expire.

Conversely, if pending applicants are allowed to settle, the lotteries for these applications will be streamlined with fewer participants in each lottery, and any lottery-winning settlement group will be able to draw on equity capital from all of the partners, not just one. This will heighten the likelihood that the station will obtain financing (either debt, equity, or a combination thereof) and that the station will actually get built and offer service to the public. In summary, the proposal to retroactively apply a settlement prohibition to already-filed MDS applications will not advance the stated goal of deterring future speculative applications. From a processing standpoint, it will delay, not expedite, the selection of a licensee.

Moreover, TSRC believes that the Commission is mistaken in assuming that most MDS applicants are insincere speculators.[3] Many, if not most, settlement groups obtain one or more lottery preferences (at least a diversity preference if nothing else). And under existing rules, any lottery participant obtaining any sort of preference whatsoever must construct and operate for at least one year before selling the system. Thus, even under existing rules, MDS applicants have for the most part been operating under the belief that they must construct and operate each MDS system for which they (or a settlement entity that they might join) might be licensed.

While some pending applicants may prefer joining a settlement group because it allows them to share the economic risk and reward of the new station with other entrepreneurs and because it creates a larger pool of beneficial owners to make capital contributions to the station until it is cash flow positive, most applicants prefer settlement only to ameliorate the risk to their application costs which is inherent in a lottery system. Most applicants would prefer to own 100% and to face the post-licensing risks alone. And even for those few who prefer less-than-100% ownership, that does not mean those applicants will abandon a

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[3] Significantly, the Commission prohibited partial settlements among mutually-exclusive nonwireline-block RSA cellular applicants in 1988. See Third Report and Order, 4 FCC Rcd. 2440 (1988). Faced with an "all-or-nothing" scenario, the public responded by filing more cellular applications per market in the RSAs than had been filed in MSAs 121-305. This experience alone suggests that prohibiting settlement groups is ineffective in reducing the number of applications filed.

stand-alone lottery win.[4] Most applicants are willing and able to construct and operate independently if he or she is lucky enough to win a lottery.[5]

IV. Settlement and Processing of Pending Applications Can Be Streamlined if the Commission Will Adhere to the Pre-Existing Settlement Policies.

When the Commission long ago decided to allow post-filing settlement of mutually-exclusive MDS applications, the Commission found that settlements were in the public interest and said it would encourage settlements. See Second Report and Order, 50 Fed.Reg. 5983, 57 R.R.2d 943, 955 (1985), where the Commission said:

> Settlements are in the public interest, because they reduce or eliminate administrative burdens, delay and expenses. In addition, they allow many different

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[4] It is not accurate to believe that any pending applicant would withdraw his or her pending application in return for a refund of the FCC filing fees. Such fees, at $155 per application, are a minor portion of the cost of getting an MDS application filed. Such applications include site assurance, engineering and legal costs, which together can run many times more than the $155 filing fee. By withdrawing an application, an applicant would forego all possibility of recouping these expenditures.

[5] The NPRM, at footnote 32, says that "more than 350 MDS construction permits or conditional licenses have been cancelled or forfeited for failure to construct." The NPRM claims this is evidence of speculative intent on the part of past licensees. However, ATD believes that the vast bulk of these non-constructed systems were authorized to participants in the 1983 filing window, which preceded the advent of the so-called "application mills". Additionally, ATD believes that many if not most of these systems were not constructed because it was not feasible to construct on only one channel group in a given market and the FCC failed to process the other channel groups in that market, leaving the licensed entity high and dry, without sufficient channel capacity to compete.

parties to contribute to and participate in MMDS service.

However, subsequently the Commission staff issued a Public Notice, "Domestic Facilities Division Advisory for Multichannel Distribution Service Applicants", Mimeo No. 13244, released May 24, 1991, which Public Notice absolutely prohibited settlement of mutually exclusive MMDS applications post-filing but before issuance of a public notice indicating the applications were accepted for filing.

The Public Notice cited no Commission regulation or case law to support this prohibition, and TSRC knows of none. Indeed, in the NPRM at ¶21 and n.38, the Commission acknowledges that today's rules expressly allow post-filing, pre-acceptance settlement activity, and states that the proposal in the NPRM to prohibit settlements for all pending applications not yet placed on public notice would be "a departure from existing practices ...."

If, as suggested by TSRC above, the Commission limits its settlement prohibition to future applications, the Commission should also expedite processing of the pending MDS applications by expressly overruling the Public Notice which has been implicitly overruled in the NPRM. The Public Notice has hindered Commission processing by effectively requiring all settlements to be hurried affairs occurring in a 16-day period between acceptance for filing (which occurs thirty days before lottery) and the two-week pre-lottery cut-off on filing settlement amendments.

The Public Notice has created a quagmire for the industry and the Commission. Settlements negotiated in such tight timeframe are less than optimal. And Commission staff have only two weeks within which to process settlement filings and recalculate preferences and lottery odds, resulting in multiple processing errors by Commission staff since the issuance of the Public Notice.[6]

Accordingly, TSRC requests that the Commission expressly state again that post-filing, pre-acceptance settlements are permissible for already-pending MDS applications.

V. Maintaining Licensee Flexibility in System Design Is of Paramount Importance to the Wireless Cable Industry.

The NPRM, at ¶12, proposes new rules regarding the interference protection criteria currently contained in Commission rules at 47 C.F.R. §21.902.[7] As the NPRM notes, current interference protection policies require MDS applicants to submit detailed analyses of the potential for harmful interference to co- and adjacent-channel MDS and ITFS stations. By requiring such analyses, this policy permits applicants the flexibility to establish wireless cable service in a given area after demonstrat-

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[6] The Public Notice cites the fact that only "acceptable" applications are entitled to lottery participation in support of its prohibition. The better processing course is to assume that all settlement members' applications were acceptable, and to allow lottery-losing applicants to file petitions to deny post-lottery in the few (if any) cases where a claim will be made that a lottery victor had too many chances. This procedure has worked well in other lottery contexts, such as MSA cellular, and was expressly adopted for MMDS, the Public Notice notwithstanding. See Second Report and Order, supra, 57 R.R.2d at 952.

[7] Appendix B to the NPRM reflected the proposed rule changes to Part 21.902 and other related sections of Part 21.

ing noninterference to existing co- and adjacent-channel stations. As the NPRM correctly notes, the advantage of this system is that it affords licensees a high degree of flexibility in designing their system.

However, the NPRM proposes to eliminate the current non-interference criteria and replace it with a strict mileage separation standard requiring that proposed facilities be located at least 80 kilometers from all existing and previously applied for co-channel stations, and at least 50 kilometers from all such adjacent-channel stations. Applicants would no longer be allowed to engineer their systems to provide 45 db desired-to-undesired system (C/I) ratio of co-channel interference protection. The purported advantage of the proposed alternative to interference analyses is that the use of the standard separation requirement would permit expedited processing of pending applications, as it would eliminate the need to verify and analyze the applicant's interference showing.

TSRC urges the Commission to reject the adoption of the specific separation standards delineated in the NPRM. The adoption of rigid separation requirements would inhibit the development of competitive wireless cable systems in the name of expedited processing of applications. However, if the wireless cable industry is saddled with strict separation requirements, the expedited processing of applications will be for naught, because the industry will surely go into decline. Treating pending and future applications under different standards than that which was

applied to existing licensees will mean that many existing operators cannot add channel capacity. Since most licensees depend on the ability to add more channel capacity to remain competitive, the Commission's proposal would hinder development of the industry.

Realistically, there is no need to change the present criteria in order to increase processing speed. The current interference analysis standard can be rendered more workable from the application processing standpoint by modifying the Commission's approach to processing. Initially, the use of fixed separation standards will not necessarily result in expedited processing of MDS applications. There will still be considerable disagreement over whether stations to be protected are entitled to such protection.

Rather, a more workable solution would be the same scenario the Commission currently follows in the processing of noncommercial FM applications. Under Section 73.509 of the Rules, an applicant for a noncommercial FM station can drop in a station where it can demonstrate compliance with the Commission's interference standards. As a processing matter, when such applications are received in the Mass Media Bureau, the staff enters the technical information into its data base and runs it through its computer program to determine whether or not the interference analysis complies with Commission rules. This same system can work effectively with MDS applications.[8]

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[8] Even in the commercial FM band the Commission has recognized that the spectrum will be utilized more effectively and that service will best be provided to the public if it allows applicants

The Commission is proposing to overhaul and update its entire MDS and ITFS data bases and to consolidate them into one data base. See NPRM at ¶22. With this accurate, up-to-date data base, the Commission can then prepare a computer program, similar to the one utilized in the noncommercial FM areas, in order to determine whether or not any given proposal meets the Commission's existing interference standards. Technical proposals can be verified by the program.

This is a workable solution which can effectively reduce the backlog of applications, yet preserve the flexibility wireless cable operators require in order to be able to establish viable systems.

As an adjunct to implementation of its proposed fixed separation standard or as an alternative thereto, the Commission proposes the use of a table to process short spaced application proposals similar to that used in the Specialized Mobile Radio Services. The short-spacing rerating table included in Appendix B of the NPRM for use by MDS applicants is unnecessary if the Commission maintains its current interference analysis standards. Such a short-spacing rerating table, although less constricting than a stand-alone separation criteria, by its very nature still eliminates the operational flexibility that is essential to wireless cable operators.

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to demonstrate non-interference through engineering analysis rather than rigid spacing criteria. See, Section 73.215 of the Rules.

As the NPRM points out in footnote 20, even the proposed 80 kilometer/48 kilometer fixed separation criteria are based on assumptions that are not accurate in many situations. In any short-spacing table an assumed height-above-average-terrain ("HAAT") will have to be established. The 180 meters HAAT proposed in the NPRM is based an estimation of the average height of a typical MDS transmitting antenna. In reality however, location of MDS transmitting antennas vary greatly and assuming 180 meter HAAT will not be accurate for most real-world cases. Far greater accuracy and predictability in co-channel interference protection will be achieved by utilizing actual operating characteristics of MDS facilities, rather than extrapolating formulas from one or two real-world cases.

VI. Application Processing for MDS Should Be Combined With Application Processing of ITFS in a Single Branch of the Mass Media Bureau.

In the NPRM, the Commission proposes various alternatives for the relocation of MDS processing, including the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania, the Mass Media Bureau and the Common Carrier Bureau, as well as a division of processing between the Private Radio Bureau on the one hand and either Common Carrier or Mass Media on the other. TSRC strongly supports the proposal to relocate MDS processing and regulation to the Mass Media Bureau.

The MDS and ITFS services are co-dependent. Almost all MDS operators need to have at least part time use of ITFS channels in order to have sufficient channel capacity to deliver a competitive video entertainment package. Moreover, MDS operators are an important and often essential source of capital for the construction of ITFS systems. Both services share the same 2596 to 2644 MHz band utilizing the same type of equipment. The propagation characteristics are identical. Since the Mass Media Bureau regulates the ITFS, it is best that the Mass Media Bureau also regulate the MDS.

As noted previously, TSRC believes that much of the past failure to construct MDS systems has been due in large part to the inability of MDS construction permittees and conditional licensees to achieve the grant (to themselves or others) of additional MDS and ITFS capacity in the same market, resulting in a lack of adequate channel capacity. If the same branch of the Mass Media Bureau was to regulate both ITFS and MDS, it is much more likely that the timing of the grant of construction permits or conditional licenses for both MDS and ITFS channels in the same geographic area would occur simultaneously, or at least in close proximity from a time standpoint. Such congruence in the timing of grants if the Commission is essential to a viable wireless cable video entertainment industry. For this reason, relocation of MDS to the Mass Media Bureau is appropriate.

As part of the relocation of MDS to the Mass Media Bureau, the Commission, in promulgating final rules in this proceeding, could also revise the MDS application form and exhibits required by that form, so as to delete the type of information which is irrelevant to MDS and to ease the processor's task in gleaning the necessary processing information from the form. For example, the MDS application form need not include information requests relative to other Part 21 services that are, unlike MDS, primarily common carrier services. The changes in the MDS application format which are likely to result from this proceeding also militate in favor in relocation of processing to the Mass Media Bureau.

VII. Immediate Reduction of the Backlog of Pending Applications Is Necessary and Appropriate.

TSRC supports the Commission's stated goal of reducing the tremendous backlog of pending MDS applications. Hershon/Drysdale supports the proposal to select among pending single-channel applicants via lottery rather than comparative hearing, as well as to complete creation of the comprehensive and consolidated data base prior to further processing.

TSRC supports the proposal to treat falsification of an entitlement to a preference as an abuse of the Commission's processes. However, it is not sufficient for the Commission to merely treat such falsification as "a reflection on an applicant's basic qualifications for licensing." The Commission should state unequivocally that such falsification shall create a presumption, rebuttable only by clear and convincing evidence, that such a

falsifier is unqualified to hold any FCC license and that all licenses and applications of such a falsifier will (not might) be designated for hearing with revocation being the only acceptable penalty in such a hearing.

VIII. Conclusion.

TSRC applauds the sentiments underlying the NPRM, as well as the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; 4) to punish those who submit false preference requests; and 5) to reduce the existing backlog by conducting lotteries and moving forward on a first-in-first-out basis.

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